U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 January 2004

BALCA Case No.: 2002-INA-294
ETA Case No.: P2002-WA-09513840/ET

In the Matter of:

SHOGUN ENTERPRISES, INC.
d/b/a
I LOVE SUSHI RESTAURANT,
Employer,

on behalf of

KAZUO ISHIKAWA,
Alien

Appearance: Robert T. Mimbu, Esquire
Seattle, Washington
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification filed by Shogun Enterprises ("Employer") on behalf of Kazuo Ishikawa ("the Alien") for the position of "Specialty Sushi Chef."[1] The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

1 Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 12, 2001, Employer filed an application for labor certification on behalf of the Alien to fill the position of Specialty Sushi Chef. (AF 53). The job required nine years of grade school and two years of experience in the job offered. The job description indicated that the employee would prepare sushi, sashimi, nigiri, robata, and other Japanese dishes according to traditional methods, and supervise and train staff, as well as order raw materials, review inventory and ensure quality control.

Employer submitted a "Statement of Recruitment Results" on December 26, 2001, indicating that U.S. applicant Takagi was interviewed by the Administrator on December 4, 2001 and completed a written examination on Japanese sushi and cuisine. (AF 77) The owner and head chef reviewed the answers. The test revealed that while Takagi had basic understanding, he did not possess the knowledge of a chef with two years of experience. Therefore, this applicant was not considered for the position.

The CO issued a Notice of Findings ("NOF") on March 11, 2002, proposing to deny certification because U.S. workers were rejected on the basis of undisclosed requirements. (AF 45-50). Specifically, the CO found that Employer found U.S. worker Takagi not qualified because he did not possess the requirement of knowledge of chef with two years of experience, this finding being based on the written examination given to the applicant. The CO noted that the ETA 750 A did not list a written test as a requirement, and therefore, Employer could not cite this requirement as a justification for finding the U.S. worker not qualified. Employer was directed to show that the U.S. worker was not qualified based on his failure to possess the requirements set forth in the ETA 750 A. (AF 47).

Employer submitted a rebuttal letter dated April 3, 2002. (AF 38-44). Employer's Administrator contended that applicant Takagi was interviewed by the Administrator, Owner and Head Chef at the corporate office on December 2, 2001. The applicant was unable to produce a letter verifying his employment and job duties and he specifically

requested that Employer not contact his former employer. The applicant also stated that he lacked experience as a supervisory chef and admitted that he did not have the confidence to perform the supervisory function of the position being offered. Employer stated that this applicant was disqualified because he did not possess the experience required for the position, he could not and would not verify his employment, and he did not demonstrate the knowledge of a sushi chef with two years of experience. Employer pointed to the applicant's written test as confirmation that he lacked basic knowledge of Japanese food preparation. It was also Employer's position that this applicant did not possess the supervisory experience required, and he was not confident that he could perform the job. (AF 42).

The CO issued a Final Determination ("FD") on June 19, 2002, denying certification. (AF 36-37). The CO found that Employer had failed to show that applicant Takagi was not qualified based on his failure to possess the requirements set forth in the ETA 750A. The CO pointed out that Employer's assertions on December 26, 2001 were in conflict with those made in rebuttal. The latter indicated that Takagi was interviewed on December 4, 2001, and completed a written examination on Japanese sushi and cuisine. The owner and head chef reviewed the answers and concluded that this applicant did not possess the knowledge of a chef with two years. In rebuttal, Employer indicated that applicant Takagi was interviewed on December 2, 2001 and that he was unable and unwilling to have his prior employment verified, lacked the supervisory experience and did not have the confidence to perform the supervisory function of the position. Noting the discrepancies in the two recruitment reports, the CO found that Employer's rebuttal was not persuasive and denied certification. (AF 37).

On July 16, 2002, Employer filed a Request for Review and the matter was docketed in this Office on September 13, 2002. (AF 1).

DISCUSSION

In its Request for Review, Employer reiterated the arguments made in rebuttal, further asserting that it went beyond that which was required to determine if this U.S. applicant could perform the job duties and that the applicant could have been rejected based solely on his unwillingness to verify two years of experience in the job offered. (AF 2-3). It was Employer's position that the applicant was interviewed on December 4, 2001 and the rebuttal letter's indication that the interview was held on December 2, 2001 was a harmless typographical error. In its brief filed on October 15, 2002, Employer argued that it lawfully disqualified Takagi because he could not produce any evidence to verify his work experience and he lacked the confidence in his ability to perform the supervisory function of the position. Employer contended it should not be penalized for exploring reasonable avenues to evaluate the applicant's qualifications.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988) (*en banc*).

In the instant case, in its statement of recruitment efforts, Employer cited the applicant's failure to pass a test he had been given as the reason for rejecting this applicant. However, this test was an unstated requirement, a violation in and of itself. An employer cannot reject an otherwise qualified U.S. applicant for the failure to meet an undisclosed requirement when that applicant meets the minimum requirements as stated on the ETA 750A. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*). When the CO noted this undisclosed requirement, Employer then provided an alternate reason for the rejection of the U.S. applicant: the inability to verify his previous employment due to Takagi's unwillingness to allow Employer to contact former employers. Employer also argued that Takagi indicated a lack of confidence in his ability to perform the supervisory function of the position. (AF 42-43).

Once an employer has rejected an apparently qualified applicant for an unlawful reason, the CO is not required to investigate the legitimacy of a totally independent reason for rejection offered by the employer for the first time in response to the NOF. *Foothill International Inc.*, 1987-INA-637 (Jan. 20, 1988). In the instant case, Employer initially claimed to have rejected U.S. applicant Takagi on the basis of a written test, a requirement not listed on the ETA 750 A. When the CO questioned Employer as to this reason for rejection, Employer provided a totally different reason for rejection. However, because the CO had already determined that the original reason for Takagi's rejection was unlawful and Employer failed to rebut this finding, the CO was not required to investigate Employer's second reason for rejecting Takagi. As such, labor certification was properly denied and the following Order shall issue:

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400

Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed